No. 18684

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

SOUTHERN ARIZONA YORK REFRIGERATION COMPANY, *et al.*,

Appellants,

vs.

THE BUSH MANUFACTURING CO., *et al.*,

Appellee.

On Appeal From the District Court of the United States, Southern District of California, Central Division.

BRIEF OF APPELLEE.

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BRIEF OF APPELLEE.

I.

STATEMENT OF JURISDICTION.

The federal jurisdiction of the District Court was invoked upon the ground of diversity of citizenship under Title 28 U. S. C., section 1332, in that Appellants are corporations organized under the laws of the State of Arizona and the Appellee is a corporation organized under the laws of the State of Connecticut with a place of business in the State of California within the territory embraced by the Federal District Court of Southern California, Central Division, and Appellants have alleged their damages to be in excess of $10,000.00 exclusive of costs and interest, but which includes attorneys' fees paid in defending a prior action.

II.
STATEMENT OF THE CASE.

A. The Action.

This is an action for indemnification for money paid by the Appellants to Swift and Company in Tucson, Arizona, under an express warranty by and between Appellants and Swift and Company. Appellants in turn filed the instant action against Appellee for indemnification alleging negligent manufacture and/or design of certain refrigeration coils.

B. The Facts.

Most of the essential facts are stated in the Pre-Trial Order and only will be summarized here.

On or about May 31, 1955, Appellants entered into a written contract with Swift and Company in the City of Tucson, Arizona, to install refrigeration equipment in Swift and Company's building located in that city. These coils were purchased by Appellants from the Authorized Supply Company of Arizona which was a distributor for Appellee in that state. Two refrigeration coils were installed by the Appellants in Swift and Company's building on or about September 5, 1955. The refrigeration coils were installed by Appellants and worked satisfactorily for a period of time estimated between one and two months thereafter. The testing of said coils was satisfactory and no leaks appeared therein until after the above-mentioned period of time.

Approximately one to two months after the installation and satisfactory testing of the coils, a leak developed in the south coil but caused no damage. Upon the advice of the representative of Appellee, Appellants'

Maintenance Engineer repaired the same and thereafter the coils again operated satisfactorily for a period of time. Some time later, other leaks appeared, one in the north coil and one in the south coil, both of which were repaired by Appellants in the same fashion as the first and the cost of these repairs being paid for by the Appellants but reimbursement therefor was made by Appellee.

On or about December 3rd and 4th, 1955, another leak developed in one of the coils permitting ammonia gas to escape into Swift and Company's storage area, not only into the room in which the coils were located, but also into the main storage room through a door which had a defective lock [Rep. Tr. p. 128, *et seq.*]. It was in the second room into which the gas escaped where the damage occurred resulting in this law suit. Meat and other products were damaged in the sum of $9,175.29.

On or about December 27th, and 28th, 1955, Appellee, through its distributor, the Authorized Supply Company of Arizona, at no cost to the Appellants, replaced said coils with new Bush coils.

Thereafter, Swift and Company filed a law suit in the United States District Court of the District of Arizona naming Appellants herein, Appellee and Authorized Supply Company of Arizona. Appellants called upon Appellee to assume the defense of the said law suit and to pay any damages sustained by Swift and Company, but Appellee refused to do so. In said law suit, Appellants filed a third-party law suit naming as defendants the Appellee herein and the Authorized Supply Company of Arizona, but the Court found therein that it had no jurisdiction over Appellee by reason of

the fact that it was not doing business in Arizona and said law suit was dismissed as to Appellee. Subsequently, Appellants were found liable to Swift and Company for the meat contained in the storage area on the basis of breach of an express warranty; the Authorized Supply Company was found not liable to the Appellants on the ground that Swift and Company had elected to rescind its contract for the sale of goods under the Arizona Sales Act, and having thus elected, had chosen an exclusive remedy for damage limiting the liability to the replacement of the goods sold as against the Authorized Supply Company. On July 29, 1960, Appellants paid in full the judgment of $9,175.29 and paid in course of the defense of the law suit, and three appeals thereof, attorney's fees and costs in the amount of $5,060.12. However, no finding herein was made by the court as to the reasonableness of such attorney's fees and costs.

The appeals mentioned herein are in the cases of: *Authorized Supply Company of Arizona,* a corporation, Appellant, *v. Swift and Company,* a corporation, *et al.*, Appellees, and *Arizona York Refrigeration Company,* a corporation, *et al.*, Appellants *v. Swift and Company,* a corporation, Appellee, 271 F. 2d 242 (1960), Re-Hearing 277 F. 2d 710 (1960), both in the Ninth Circuit.

At the trial of the within action, evidence was offered by Appellants in the form of testimony contained in depositions of: Leland Gideon, Service Manager for Arizona York; Charles Sayers, Foreman in charge of installation of equipment for Appellant; Maurice D. Gerhart, an independent refrigeration serviceman, and Allen Decker, Vice President of Appellee in Charge of

Engineering [under Section 43(b) Rules of Civil Procedure]; Oliver Butler, who was then District Sales Manager of Appellee [under the same section], and Dino Morelli called as an expert witness by Appellants who was by profession a technical consultant and a professor of engineering and design at "Cal-Tech" in Pasadena.

Mr. Gideon testified [Rep. Tr. p. 14 *et seq.*] that he started the refrigeration coils and checked them out, that he went over them to be sure that everything worked, that the proper temperatures in the rooms were maintained, and that he didn't find anything the matter that he couldn't make perform and work; that the coils performed satisfactorily, but later on some leaks appeared. He testified that the ammonia gas was coming out of the electrode tube. He stated that "In a break, the gas would come out definitely through where the electrode is inserted. Not the weld at the head. The leak was not at the weld" [Rep. Tr. p. 35].

Mr. Sayers, Foreman of Installation, stated that he installed the equipment, had no difficulties therewith, it was a routine affair, used testing procedures and the equipment tested out satisfactorily. He found no leaks in the coil during the testing procedures [Rep. Tr. pp. 46, 50, 51, 52, 54, 56].

Mr. Gerhart, a refrigeration serviceman, tested the coil after the leak occurred which caused the damage. He stated "The leak was where the heater element entered the header in the coil," [Rep. Tr. p. 65, lines 9, 10]. He further stated that in his opinion the leak *was caused by the weld* (emphasis added), stating "In my opinion, the weld was not strong enough or ex-

pansion or contraction loosened it in some manner so that it leaked," [Rep. Tr. p. 65, lines 18-21]. Beginning on page 76 of the Reporter's Transcript, Mr. Gerhart testified that he could observe a hole through which the ammonia was leaking, that he could see it with his naked eye and that it was a thin crack, maybe five or six thousands of an inch. The slit could have been caused by a hitting or a jarring of the tube [Rep. Tr. p. 77]. He further stated that the slit in the weld was about one-half an inch long [Rep. Tr. p. 82]. It should be noted at this point that the testimony of Mr. Gerhart is in conflict with that of Mr. Gideon, both of whom were Appellants' witnesses.

Appellants are in error when they state on page 6 of their Opening Brief that Mr. Gerhart gave his opinion that the leak was caused by expansion and contraction of the intertube at its connection with the suction header causing it to leak. That was not the statement of Mr. Gerhart at all; the testimony was as heretofore indicated wherein Mr. Gerhart stated "Well, in my opinion, the weld was not strong enough or expansion and contraction loosened it in some manner so that it leaked," [Rep. Tr. p. 65, lines 18-21].

Also, the statement by Appellants on the same page of their Opening Brief that Mr. Allen Decker, Vice President In Charge of Engineering of Appellee, testified on pages 95 and 96 of the Reporter's Transcript that "Arcing at the cold juncture and the heater element having been placed inside the intertube, could have caused trouble" is in error. There is no such testimony of Mr. Decker.

Dr. Morelli attempted to give an explanation of the cause of the leak, but admitted that he was not familiar

with the particular unit involved in this action, he had never been to the factory, he had never seen a coil manufactured such as the one under consideration [Rep. Tr. pp. 143, 144]; he further stated that the principle of electrically defrosted units "Is as old as Christmas," [Rep. Tr. p. 146, line 6].

At the conclusion of Appellants' case, the trial court granted a dismissal with prejudice under Rule 41(b) of the Federal Rules of Civil Procedure.

III.

APPELLANTS' SPECIFICATION OF ERROR.

Appellants contend that the District Court erred on the following bases:

1. That Appellee is estopped to deny that the refrigeration coils were defective when furnished;

2. Under the doctrine of *res ipsa loquitur*, an inference of negligence was raised;

3. Said inference was not overcome by the Appellee by way of explanation; and

4. The doctrine of *res ipsa loquitur* placed the burden on defendant of at least offering evidence to overcome an inference of negligence.

In the "Designation of Points on Appeal" filed by Appellants herein, Appellants state "That the trial court was in error in finding under the doctrine of equitable indemnity and/or doctrine of *res ipsa loquitur* that the defendant negligently manufactured and/or designed the refrigeration coils installed in Swift and Company's plant in Tucson, Arizona."

IV.
QUESTIONS PRESENTED.

1. Whether Appellants are entitled to equitable indemnity; and if so, under what theory?

   (a) Collateral estoppel;

   (b) Negligence; and if not proved,

2. Whether this case is one in which the doctrine of *res ipsa loquitur* applies in order to establish negligence?

3. Is the action barred by the Statute of Limitations?

4. Does the Court have jurisdiction of the matter?

V.
SUMMARY OF ARGUMENT.

1. Appellants are not entitled to rely upon the theory of collateral estoppel for the reason that this doctrine is confined to issues actually litigated by and between the same parties in a different action, and at the time of judgment in the prior action herein, the parties hereto were not parties to that action.

2. (a) The doctrine of *res ipsa loquitur* does not apply in this case for the liability of the manufacturer or supplier of a chattel for damages for injury to property is limited to the situations where the manufacturer or supplier and the injured plaintiff are in privity. The only exception to this rule is where the manufactured articles are imminently dangerous or where it is reasonably certain if negligently designed or manufactured to place life and limb in peril.

(b) An essential element of the doctrine of *res ipsa loquitur* is absent in that the agency or instrumentality which allegedly caused the damage was not in the control of the Appellee at the time of the damage.

3. The motion under Federal Rules of Civil Procedure, Rule 41(b), gives the right to the defendant to make the motion to dismiss and the trial court can take an unbiased view of all of the evidence, direct and circumstantial, and accord to it the weight it believes it is entitled to receive.

4. The action herein, being one basically couched in negligence, is barred by the statute of limitations, no matter what jurisdiction is applied.

5. The District Court had no jurisdiction because the amount in controversy does not exceed $10,000.00, the original judgment being for less than that amount, and this is not a proper case for the addition of attorney's fees in order to make the jurisdictional amount in diversity cases.

VI.

ARGUMENT.

A. Appellant Is Not Entitled to Equitable Indemnity Under Either Theory of Collateral Estoppel or Negligence.

1. The term "collateral estoppel" is now a term in common usage in the Restatement of Judgments and is often referred to as estoppel by judgment in connection with the doctrine of *res judicata.*

The doctrine of collateral estoppel arises only where there is a second action between the same parties on a different cause of action. The first judgment operates as an estoppel or conclusive adjudication as to such

issues in the second action as were actually litigated and determined in the first action [*Todhunter v. Smith,* 1934, 219 Cal. 690, 695, 28 P. 2d 916. See generally, Restatement Judgments, section 68; *Sutphin v. Speik,* 1940, 15 Cal. 2d 195, 202, 99 P. 2d 652, 101 P. 2d 497).

The effect of a judgment as a collateral estoppel is confined to issues actually litigated, and although the meaning of "issues ligitated" is far from clear in the decisions, it seems perfectly apparent in the instant case that the issue of negligence was not litigated. Appellee here was not a party to the action entitled *"Southern Arizona York Refrigeration Company v. Swift and Company, et al."* before the United States District Court for the District of Arizona, Appellee having been dismissed from said law suit prior to the entry of judgment. In addition, this Honorable court stated in its opinion, at page 244 of 271 Fed. Rep. 2d, as follows:

> "It is clear from the pleadings, the evidence, and the plaintiff's brief filed in this Court that plaintiff seeks recovery of damages against defendants only on the theory of breach of express and implied warranties of a contract for the sale of goods."

Upon rehearing of said case before this Honorable Court, judgment was given to the plaintiff therein upon an express warranty executed by the defendants therein (Appellants here) in which they warranted "all equipment, material and workmanship furnished by the defendants against defects." The Court did find in that action that "Because of defects in one of the Bush coils furnished plaintiff by defendant Arizona York Refrigeration Company, large quantities of ammonia

gas escaped from the refrigeration system in plaintiff's plant and permeated various portions of plaintiff's plant thereby contaminating and damaging large quantities of plaintiff's products stored in the plant". However, there was no finding of any negligence whatsoever.

The doctrine of collateral estoppel does not apply in the instant action for the reason that the same parties were not before the District Court of Arizona. But, even assuming, while not admitting, that the damage to the meat in the Swift and Company's plant was caused by a defect in the coils which were furnished by the Appellee, still there is no finding nor judgment whatsoever as to any negligence or any lack of care whatsoever on the part of Appellee in the manufacture and/or design of the refrigeration coils.

The cases cited by Appellants on page 9 of their Brief are not in point and do not support the argument set forth therein. The case of *Lamb v. Belt Casualty Company,* 3 Cal. App. 2d 624 involved an action for damages for personal injuries as a result of a collision of an automobile with a trailer attached to the automobile truck. The defendant therein had separate policies of insurance, one on the truck and one on the trailer. The case involved the question of excess insurance and did not involve indemnification at all except as between co-insurers, one of which was primary and the other excess. In *Bachman v. Independence Indemnity Company,* 112 Cal. App. 465, 297 Pac. 110, there was involved an action to recover from an insurer the amount of the judgment against the insured where the insurer failed to undertake the defense under the policy. The policy was for public liability indemnity, but again the indemnification arose out of

an insurance policy, a written document, insuring the tort feasor for personal injuries occasioned by him.

The *Santa Cruz Portland Cement Company v. Snow Mountain Water and Power Company,* 96 Cal. App. 615, 274 Pac. 617, involved the question of defendant's liability on a surety bond where a contractor defaulted a job. The surety did not complete the job and the action was against it. The guarantors agreed to become cross-defendants and suffer judgment. The Court held that the defendants could not complain in a subsequent suit by the surety against them as guarantors.

The *West Jersey and S. S. R. Company v. Atlantic City Electric Company,* 107 N. J. Eq. 457, 153 Atl. 254 involved a contract between a railway and an electric company desiring to place wires across the railroad right-of-way. The defendant therein agreed to indemnify the plaintiff for all loss, claims or damages, resulting from the construction. One of the plaintiff's employees was killed and the widow recovered under the Compensation Act against the plaintiff. The court stated that the bill in equity should be dismissed for the reason that the plaintiff had an adequate remedy at law. It commented, however, that indemnification under the contract was available in the legal action and held that the judgment against the plaintiff for workman's compensation in favor of the deceased employee's widow was conclusive as against the defendant. There was no negligence involved; the only issue that was decided in that case was that the plaintiff had an adequate remedy at law.

2. It is obvious that Appellants herein have not established any negligence on the part of the Appellee

and, in fact, admit that if recovery is to be had, and if a reversal is to be received by this Honorable Court, then it must be on the basis that the motion to dismiss was erroneously granted due to the fact that the doctrine of *res ipsa loquitur* applies in this type of action.

B. The Doctrine of Res Ipsa Loquitur Does Not Apply in This Case.

Res ipsa loquitur has been held to be a doctrine involving evidence only and not of substantive law. Consequently, it should be governed by the laws of the forum. In California the doctrine itself merely raises an inference of negligence, and in order to make the doctrine applicable, there must be three conditions present:

1. The accident must be caused by an agency or instrumentality under the exclusive control of the defendant;

2. The accident must be a type which ordinarily does not happen unless someone is negligent;

3. It must not have been due to any voluntary act or contributory fault of the plaintiff.

It must be remembered at all times that this is not the ordinary case of a plaintiff attempting to establish negligence on the part of the defendant, but is an action for equitable indemnity based upon a legal theory of negligence. Appellants assume, (1) That the "Accident" herein was a kind which ordinarily does not occur in the absence of someone's negligence; an assumption that is not warranted; and (2) that there was not any voluntary action or contribution on the part of the plaintiff; again an assumption that is not warranted

in view of the lapse of time between the shipping of the coils from Appellee's place of business to Arizona.

Appellants apparently concede that the coils were not under the control or management of Appellee at the time of the accident and attempt to justify this lack of the first condition by stating "Under some circumstances, it is sufficient if it appears that the injuring agency was in the control of the defendant at the time of the negligent act which caused the injury . . ." (p. 11 of Appellants' Brief). This statement not only presupposes that there is some negligence, but also Appellants fail to point out wherein there is any evidence whatsoever that the condition of the instrumentality which caused the damage was not changed after it left the Appellee's possession.

Appellants rely to a great degree on the case of *Jump v. Ensign-Bickford Company,* 117 Conn. 110, 167 Atl. 90. In this case, the plaintiff was very seriously injured by the premature discharge of dynamite when he was engaged in blasting certain rocks in a mine. The contention was that the premature explosion caused by a quick fuse was due to defects in the fuse which caused the quick burn. The plaintiff brought this against the defendant upon the ground that it was negligent in the manufacture of the fuse and in its inspection before it shipped it from the factory. The jury returned a verdict for the plaintiff which the trial court set aside as against the evidence and an appeal was taken by the plaintiff. The Supreme Court of Errors of Connecticut affirmed the judgment of the trial court.

The plaintiff in the *Jump* case did not stress the application of the doctrine of *res ipsa loquitur,* but did claim that the jury might draw an inference of negli-

gence from the circumstances. The Court stated that the doctrine of *res ipsa loquitur* is a rule of common sense but not a law which dispenses with proof of negligence. It is a convenient formula for saying that a plaintiff may, in some cases, sustain the burden of proving that the defendant was more probably negligent than not by showing how the accident occurred without offering any evidence to show why it occurred (quoting from *Stebel v. Connecticut Co.,* 90 Conn. 24, 25; 96 Atl. 171, 172).

This case follows those particular cases dealing with *manufacturer's liability* where the instrumentality causing the injury is *imminently dangerous* within the rule fixing manufacturer's liability. In the *Jump* case the trial court in its memorandum setting aside the verdict regard the evidence as establishing "an indisputable physical fact" which did not permit a reasonable conclusion of negligence on the defendant's part. In the instant case, it is obvious that from and after the time of shipping of the coils from Connecticut to Tucson, Arizona, Appellee had no control over the transportation, storing, installation, operation, or maintenance of the coils, but that the coils were in the control of the Appellants and/or Swift and Company and/or a transportation company from the time of leaving Connecticut until the installation in Tucson, Arizona. In view of the fact that refrigeration coils are not inherently dangerous, and that a long period of time ensued wherein said coils were not in the control of Appellee, it is obvious that the "control" factor in the doctrine of *res ipsa loquitur* is missing and cannot be supplied by relying upon a case or cases which involve inherently dangerous articles which can be dangerous to life and limb.

Appellants state on page 13 of their Brief, that "The defect, when discovered, was inside the coil." This is not the true statement of fact. The evidence presented by Appellants at the time of the trial created a conflict in the evidence between its own witnesses; one stating that in his opinion the defect was inside the coil somewhere in one of the tubes, and the other stated that upon testing the coil after the escape of the ammonia gas, he found that gas was escaping from a slit or hole in the weld which in effect is outside the tubes. A slit or a hole in the weld could have been caused by an outside force, especially since there has been no control by the Appellee from the time of shipment from Connecticut to Arizona. Thus, there is no certainty as to the cause, actually, of the damage to the meat and no certainty as to what the defect was in the coil, if any. The need for the precaution of the condition of control in the doctrine of *res ipsa loquitur* is obviously present in this case and cannot be obviated.

C. Liability of a Manufacturer or Supplier of a Chattel for Damages for Injury to Property Is Limited to the Situation Where the Manufacturer or Supplier and the Injured Plaintiff Are in Privity.

1. Negligence on the part of the manufacturer cannot be inferred under the *res ipsa loquitur* rule where the manufacture and the marketing of the merchandise is not imminently, intrinsically or essentially dangerous in and of itself or when applied to its intended use (see the American Law Institute's Restatement Law of Torts, Vol. 2, § 395).

Traditionally, privity has been viewed as a prerequisite to recovery in a negligence action growing out of

product-caused injury. Hence, in a negligence action against a producer or seller of industrial equipment and similar products, recovery will be denied if privity does not exist as between the injured person and the defendant, unless the jurisdiction is one in which the privity requirement has been repudiated in toto, or on which an exception to the requirement has been drawn with respect to a particular classification of cases which comprehend such an injury-causing product. Whatever ground is alleged in an action for injury caused by a product, the establishment of certain facts is indispensable to recovery. Thus, it must be shown that the product in question was actually defective or harmful in some way; the parties sought to be held liable for the injury must be shown to have actually manufactured or sold it, or must be identified with the harm-causing product, and a causal relation must be shown to exist between the defendant manufacturer's act or omission and the injury which is sought to hold him liable. The defect must be shown to have existed at the time the product left the defendant manufacturer or seller. *O'Donnell v. Geneva Metal Wheel Co.,* 1950, Ca. App. 6th Ohio, 183 F. 2d 733, rehearing denied 190 F. 2d 59, certiorari denied, 341 U. S. 903, 95 L. ed. 1342; see also *Darling v. Caterpiller Tractor Co.,* 1959, 171 Cal. App. 2d 713.

In the case of *Tayer v. York Ice Machinery Corp.,* 1938, 342 Mo. 912, 119 S. W. 2d 240, 117 A. L. R. 1414, an action for death was brought as a consequence of the explosion of ammonia fumes which escaped from a crack in the manifold on an ammonia ammonia compressor sold to decedent's employer by defendant manufacturer. The Court held the defend-

ant not liable under the *res ipsa loquitur* rule pointing out that the rule was a qualification of rather than an exception to the general rule of evidence that negligence must be affirmatively proved in that it relates to the mode rather than the burden of establishing negligence; that the rule springs not from the fact of injury, but from the facts attending the occurrence.

The Court said that the negligence on the part of the defendant manufacturer could not be inferred under the *res ipsa loquitur* rule in view of the fact that it was shown that the machine had passed into the possession and control of the decedent's employer and had been continuously operated for a period of time during which it was subjected to deterioration incident to operation. Moreover, the evidence was said to show no actionable negligence in the manufacture, inspection or test of the manifold in view of the testimony that the crack in the manifold was caused by rapid changes in temperature and flaws therein; that the manufacturer tested the compressor after installation which failed to show any leaks; that the manifold was continuously operated by the purchaser for a period of time free from control of the defendant during which time it was subject to the flow of and pressure from ammonia and to rapid changes in temperature and to "knocks" occasioned by liquid ammonia which immediately would have an effect on the manifold casting.

In another action brought to recover for injury sustained by an employee of the purchaser of an air compressor, the Court in *Fedor v. Albert,* 110 N. J. L. 493, 166 Atl. 191 held that the doctrine of *res ipsa loquitur* was inapplicable. The control of the defendant requisite to the application of the doctrine was absent, in

this reported case in which it appeared, that the compressor tank burst two months after it had been delivered.

2. Applicability of the Rule and Cases Involving Injury to Property.

The rule of immateriality of privity where the part is imminently dangerous is applicable to products which have other parts to be incorporated in the product of one other than the defendant manufacturer or seller if the parts are so negligently made as to render the products in which they are incorporated unreasonably dangerous for use. In other words, the privity requirement in actions of this type between the manufacturer and the injured party can be obviated if the product is imminently dangerous to life or limb.

The great weight of authority views the "imminently" dangerous product exception to the requirement of privity as applicable only in cases involving injury to the person and not in cases involving property damage. *Russell v. Sessions Clock Co.,* 1955, 19 Conn. Supp. 425, 116 A. 2d 575. In the case of *Jump v. Ensign-Bickford Co.,* 1933, 117 Conn. 110, 167 Atl. 90, the Court said that imminently dangerous had reference to an article which is of such a nature that danger in its use is imminent; that is, "Its use for the purpose for which it is intended is fraught with immediate peril carries a threat of serious impending danger." See also *Larramendy v. Myres,* 1954, 126 Cal. App. 2d 636, 272 P. 2d 824. See *Sheward v. Virtue,* 20 Cal. 2d 410. In that case, the Court said that it is universally recognized that a manufacturer or seller of an article which is inherently and imminently dangerous to human life

or health, or which although not dangerous in itself becomes so when applied to its intended use in the usual and customary manner, is liable to any person whether the purchaser or third person who, without fault on his part, sustains injury which is the natural and proximate result of negligence in the manufacture or sale of the article. If the injury might have been reasonably anticipated, liability does not rest on the ground of warranty, nor does liability depend on privity of contracts, but rather on a breach of public duty owing to all persons into whose hands the article may lawfully come and by whom it may be used and whose lives may be endangered thereby to exercise care and caution commensurate with the peril and not to expose human life to danger by carelessness or negligence.

One of the latest enunciations of the law in California is found in *Varas v. Barco Manufacturing Company,* 205 Cal. App. 2d 246. This was an action in negligence against a manufacturer and the lessor of a gasoline-operated earth compactor for injuries allegedly occurring when the machine spread gasoline on the body of the operator. The gasoline was ignited by a spark from the machine and the plaintiff was injured.

In connection with the consideration of the legal duty of each defendant in respect to the machine, the Court stated on page 257 "The manufacturer of a chattel owes a duty of care toward a user, although there is no privity of contract between them, where the article is inherently dangerous or where it is reasonably certain if negligently designed or manufactured, to place life and limb in peril." *Darling v. Caterpiller Tractor Co.,* 171 Cal. App. 2d 713, 720, 341 P. 2d 23, see 2 Harper & James, The Law of Torts, §28.3-28.11, 28.14.

The essence of Appellants attack against Appellee is grounded upon a product-caused liability cause of action and based upon negligence. The Appellants and Appellee were not in privity. Therefore, under the overwhelming state of the law regarding product liability cases, Appellant cannot prevail because the article manufactured and/or designed by Appellee in this instance was not one which was inherently dangerous, nor was it one which was likely to cause danger to life or limb.

D. In a Non-Jury Case the Defendant May Move to Dismiss at the Close of Plaintiff's Presentation Because "Upon the Facts and the Law, the Plaintiff Has No Right to Relief."

Federal Rules of Civil Procedure, Rule 41(b) gives the right to the defendant to make a motion to dismiss which constitutes a mid-trial test of the sufficiency of plaintiff's cause of action. It serves a function comparable to that of a motion for directed verdict in a jury case or a motion for non-suit under California Code of Civil Procedure Section 581(c).

If the above motion had been a motion for a directed verdict, Appellants would perhaps be correct in their allegation on page 16 of their Brief that the Court must assume that all evidence received in favor of the plaintiff relative to the issues is true and all inferences and doubtful questions must be construed most favorable to the plaintiff, for in a directed verdict situation, the Court can grant the motion only if the evidence considered in the light most favorable to the plaintiff is insufficient as a matter to justify a verdict. *Courtner v. Custer County Bank* (9th Circuit 1952), 198 F. 2d 828. This is not such a case. On the other

hand, after a motion to dismiss on a non-jury case, the court is not bound to review the evidence in the light most favorable to the plaintiff with all attendant favorable assumptions. Instead, the judge should take an unbiased view of all of the evidence, direct and circumstantial, and accord it the weight he believes it entitled to receive. *Huber v. American President Lines* (2nd Circuit 1957), 240 F. 2d 778; *Allred v. Sasser* (7th Circuit 1948), 170 F. 2d 233. The granting of a motion to dismiss under Rule 41(b) results in adjudication on the merits, a dismissal with prejudice unless the court otherwise specifies.

E. The Within Action Is Barred by the Statute of Limitations.

Essentially speaking, the cause of action brought by the plaintiff herein, even though called "indemnification" is one for negligence. The cause of action is couched in negligence, and as such, the survival of such actions, generally regarded as substantive, is treated as procedural in California; and in this instance, procedural matters are generally governed by the law of the forum. *Hamlet v. Hook* (1951), 106 Cal. App. 2d 791, 794, 236 P. 2d 196. While statutes of limitations and similar time provisions raise exceedingly difficult problems in the field of conflict of laws, the starting point is the notion that the statute is procedural and therefore governed by the law of the forum. Hence, the action is barred if the limitation period of the forum has run even though the action might still be maintainable elsewhere (Restatement Conflict of Laws §603; *Ohio v. Porter,* 1942, 21 Cal. 2d 45, 47, 129 P. 2d 691; *Sullivan v. Shannon,* 1938, 25 Cal. App. 2d 422,

425; *Littlepage v. Morck,* 1932, 120 Cal. App. 88, 7 P. 2d 716).

The statute of limitations in California on damages for negligence for property damage is two years. The Code of Civil Procedure, Section 339 (1) states:

> "Within two years. An action upon a contract, obligation, or liability not founded upon an instrument of writing, other than that mentioned in subdivision 2 of Section 337 of this code . . ." Also, Code of Civil Procedure, § 361 states: "The effective limitation of laws of other states. When a cause of action has arisen in another state, or in a foreign country, and by the laws thereof, an action thereon cannot there be maintained against a person by reason of the lapse of time, an action thereon shall not be maintained against him in this state, except in favor of one who has been a citizen of this state, and who has held the cause of action from the time it accrued."

Despite the question of the conflict of laws and to which statute is applicable, *i.e.* that of California, of Arizona or of Connecticut, the situation and result is the same.

The statute of limitations in the State of Arizona on actions for injury to real or personal property is two years. *Arizona Revised Statutes 1956, §12-522, 524.* Also, in the State of Connecticut the statute of limitations for injuries to real or personal property caused by negligence is one year. *Connecticut General Statutes, Revision of 1958, §52-584.*

It, therefore, appears that under the law of any state in which this action might be determined, the statute of limitations for actions couched in negligence for damage to personal property is not to exceed two years and has long since passed.

The affirmative defense and contention of Appellee with this regard should be sustained.

F. The Court Has No Jurisdiction.

Appellee contends that the District Court of the United States had no jurisdiction in this matter which is based upon diversity of citizenship on the ground that the matter in controversy does not exceed the sum of $10,000.00, exclusive of interest and costs.

The amount recovered by Swift and Company from the Appellants herein was less than $10,000.00. Appellants contend that attorney's fees paid by them in the prosecution of the appeals in the former action, as well as the defense to the trial of the action, should be added to their judgment, and, as authority, rely in general upon the equitable law of indemnity. However, in matters of this kind where the amount and the jurisdiction of the court is concerned, the only cases relating to this question stem from indemnifications, guarantees or suretyships in writing where the defendant in the prior action was forced to pay attorney's fees by reason of some written agreement or statute of the law of the forum.

It follows then that the actual amount in controversy here is the amount of the judgment obtained by Swift and Company against the Appellants in the District Court for the District of Arizona which is less than $10,000.00.

Attorney's fees may be included in computing the jurisdictional amount where they are provided for as part of the damages in the contracts sued upon and where the fees are allowable by state statute in specified actions (*Springstead v. Crawfordsville State Bank* (1913), 231 U. S. 541; *Missouri State Life Insurance Co. v. Jones* (1933), 290 U. S. 199).

There is no contract providing for the payment of attorney's fees, nor is there any state statute imposing such an obligation. Therefore, the true amount in controversy is the sum of $9,175.29, less than the statutory amount required for jurisdiction in diversity cases (28 U. S. C. 1331, 1332(a)).

CONCLUSION.

As heretofore stated, Appellee contends, and it has been proved, that Appellee had no control over the transportation, storing, installation, operation or maintenance of the refrigeration coils; but contrary speaking, said coils were in the control of the Appellants and/or Swift and Company ever since they were shipped from Connecticut to Arizona. Further, Appellee contends that the contract for the purchase of the said coils was rescinded by Swift and Company, the coils returned and everything already paid by the Appellants has been recovered by Appellants. Inasmuch as the purportedly defective coils were replaced by the Appellee and accepted by the Appellants, the terms of the sale of the said coils from Appellants to Swift and Company contained an express warranty which limited the Appellants remedy to the repair or replacement of the same, and replacement has been made. Appellants have not shown any negligence whatsoever in either the

manufacture or design of the coils and have failed to prove that even if there were negligence, that the damage to the meat was the proximate cause of the defect. In addition, because of the fact that the cause of action grounds in negligence, and the fact that it occurred more than four years prior to the bringing of this action, is a good indication that the statute of limitations should apply.

Were it not for the fact that Appellant expended great sums in defending a lawsuit and two appeals, the amount in controversy would be below the jurisdictional amount. Attorney's fees should not be added to the amount of damages to invoke the jurisdiction of this court.

It is respectfully submitted that the District Court's order dismissing the action should be affirmed.

TREMAINE & SHENK,
By JOHN W. SHENK,
Attorneys for Appellee.

Certificate.

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those Rules.

JOHN W. SHENK